IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

KATHY PROSOKI-LARGE *Plaintiff,* v. ST. JOSEPH PLUMBING & HEATING, DOUG BURKETT and DEWAYNE LISTER, *Defendants.*	)	Case No.: 5:14-cv-06091-DGK Removed from the 5th Judicial Circuit Court of Buchanan County Missouri | 14CV-02804

PLAINTIFF'S MOTION TO REMAND AND SUGGESTIONS IN SUPPORT THEREOF

Plaintiff, Kathy Prosoki-Large, for the reasons stated herein moves this Court to remand this action back to state court and offers the following in support:

1. This action was originally filed in the 5th Judicial Circuit Court of Buchanan County, Missouri on June 25, 2014. [doc. 1].

2. On August 14, 2014, Local 45 and Gary Silvey removed Large's petition, citing DFR and LMRA Preemption. [doc. 1].

3. On August 21, 2014, St. Joseph Heating and Plumbing and Dewayne Lister filed thier consent to Local 45's notice of removal. [doc. 5].

4. On December 23, 2014, Plaintiff Large and Defendants Local 45 and Gary Silvey, filed their stipulation of dismissal, wherein, per Fed.R.Civ.P 41(a)(1)(A)(ii) they agreed to stipulate to the dismissal of Defendants Local 45 and Gary Silvey from this case. [doc. 40].

5. On January 5, 2015, this Court ordered that Local 45 and Gary Silvey be dismissed with prejudice. [doc. 41]. The Court's dismissal of these parties, also effectively

removes the basis of removal (the previous DFR and LMRA preemption arguments made by Local 45 and Gary Silvey). [doc. 1].

6. Thus, the only remainging defendants are St. Joseph Heating and Plumbing and Dewayne Lister.

7. Large's petition made no claim, nor does she assert any right, arising under the Constitution or laws of the United States. Rather, she asserts only a gender discrimination claim under the Missouri Human Rights Act, RSMo § 213.010, *et seq* (MRHA). *See* Petition, attachment to Notice of Removal. [doc. 1].

8. As discussed in Large's reply brief in support of her motion for leave to file an amended compalint ([doc. 39]), there is nothing in her complaint, amended or otherwise, that suggests her MHRA gender claim, against St. Joesph Heating and Plumbing and Dewayne Lister, is dependant upon interpretation of any collective bargainging agreement. Rather, her complaint creates a reasonable inference that St. Joseph Heating and Plumbing and/or Dewayne Lister treated her differently because of her sex. [doc.1 and attachment 1 to doc. 29].

9. Accordingly, removal of this action is specifically prohibited, and is properly remanded, as there are no claims alleged which fall under the treaties or laws of the Unites States.[1]

10. This Court is one of limited Jurisdiction. Indeed, the removal statutes are strictly construed and any doubt concerning the propriety of removal is to be resolved in *favor of remand*.[2] Moreover, courts must be "mindful that the nature of federal removal jurisdiction - restricting as it does the power of the states to resolve controversies in their own courts - requires

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[1] 28 U.S.C. §1441(b).
[2] *Hinkle v. Norfolk Southern Ry. Co.*, 2006 WL 3783521 (S.D. Ohio 2006) *citing In re Business Men's Assur. Co of America*, 992 F.2d 181, 183 (8th Cir. 1993). (Emphasis added).

strict construction of the legislation permitting removal".[3] Additionally, if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *must be remanded* to the state court from which it was removed.[4]

11. Finally, the party invoking jurisdiction bears the burden of proof that all prerequisites to jurisdiction are satisfied.[5]

12. Here, St. Joseph Heating and Plumbing and Dewayne Lister merely consented to the removal (based on Local 45's preemption arguments, now absent from this case). Indeed, no briefing was submitted by St. Joseph Heating and Plumbing and/or Dewayne Lister regarding removal - just their consent, likely to ensure a federal forum for the state-law MHRA claim brought against them. Additionally, it is anticipated that remaing defendants will argue that Court should look at jusidiction at the time of removal.

13. Pendent jurisdiction however, as held by the Supreme Court in *Mine Workers v. Gibbs*, is discretionary.[6] *Gibbs* dealt with dismissal of a claim originally filed in federal court, but is analyzed, for purposes of remand, in *Carnegie-Mellon v. Cohill*.[7]

14. Prior to *Gibbs*, the test for determining when a federal court had jurisdiction over such state-law claims was murky, however, and the lower courts experienced considerable difficulty in applying it.[8] In *Gibbs*, the Supreme Court responded to this confusion by establishing a new standard for deciding whether a federal court has jurisdiction over a state-law claim.[9] The Supreme Court stated that a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case

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[3] *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 861 (8th Cir. 2002).
[4] 28 U.S.C. §1447(c). (Emphasis added).
[5] *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 975 (8th. Cir. 2011).
[6] *Mine Workers v. Gibbs*, 383 U.S. 715 (1966).
[7] *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348-49, 108 S. Ct. 614, 618, 98 L. Ed. 2d 720 (1988)
[8] *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. at 349.
[9] *Id.*

"derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding."[10] The intention of this standard was not only to clarify, but also to broaden, the scope of federal pendent jurisdiction.[11] According to *Gibbs,* "considerations of judicial economy, convenience and fairness to litigants" support a wide-ranging power in the federal courts to decide state-law claims in cases that also present federal questions (none of which are present here).[12]

15. At the same time, however, *Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power. The *Gibbs* Court recognized that a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating parties.[13] For this reason, *Gibbs* emphasized that "*pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.*"[14] Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, *as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice*.[15] Or in this case, remanding it. As articulated by *Gibbs*, the doctrine of pendent jurisdiction is a doctrine of flexibility, designed

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[10] *Id. Citing Mine Workers v. Gibbs*, 373 U.S. at 725.
[11] *Id. Citing Mine Workers v. Gibbs*, 373 U.S. at 725 (stating that the prior approach, at least as applied by lower courts, was "unnecessarily grudging").
[12] *Id. Citing Mine Workers v. Gibbs*, 373 U.S. at 726.
[13] *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. at 350.
[14] *Id.* (Emphasis added).
[15] *Mine Workers v. Gibbs*, 383 U.S. at 726-27. (Emphasis added).

to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.[16]

16. Accordingly, Ms. Large asks that this Court not exercise its discretion because the only parties touching on issues which fall under the treaties or laws of the Unites States have been dismissed with prejudice. [doc. 40].

17. Bottom line: for the reasons stated, this Court should remand this case and not exercise its discretion to hear Ms. Large's state-law MHRA discrimination claim regarding whether St. Joseph Heating and Plumbing and/or Dewayne Lister treated Ms. Large differently because of her sex.

18. Accordingly, Plaintiff asks this Court to Order that this case be remanded back to Buchanan County Circuit Court.

[16] *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. at 350.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on February 25, 2015 via the Court's CM/ECF system to:

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